

Jan 18, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHNNY ANDRES ASUNCION, III,

Defendant.

No. 1:17-CR-02015-EFS-1

**ORDER DENYING DEFENDANT'S MOTION  
FOR NEW TRIAL**

On November 13, 2017, the Court commenced jury trial in this matter. ECF No. 74. On November 16, 2017, the jury returned a guilty verdict. ECF No. 82. Before the Court is Defendant Johnny Andres Asuncion, III's Motion for New Trial, ECF No. 85. Having thoroughly considered the parties' briefing and the record, the Court finds oral argument to be unnecessary. For the following reasons, the Court denies Mr. Asuncion's Motion.

**I. APPLICABLE LAW**

Under Federal Rule of Criminal Procedure 33, a court may grant a motion for new trial if "the interest of justice so requires." District courts have broad discretion in deciding whether to grant or deny a new trial. See *United States v. Steel*, 759 F.2d 706 (9th Cir. 1985). Nonetheless, new trials are granted "only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981).

1                                   **II.    DEPUTY PEPPER'S TESTIMONY**

2           During trial, near the beginning of the Government's case,  
3 Deputy Pepper testified that he was performing surveillance in an  
4 effort to arrest Mr. Asuncion on a federal probation warrant. Deputy  
5 Pepper further testified that based on information he had received, he  
6 had set up surveillance at a certain residence in Selah and was  
7 looking for "Johnny Asuncion, a black passenger vehicle, and a black  
8 case that he would be carrying with him."<sup>1</sup> Mr. Asuncion's first  
9 argument is that "Deputy Pepper's testimony made it appear as if the  
10 black case was connected somehow to the federal warrant," and that  
11 this caused him prejudice. See ECF No. 85 at 3.

12           Unbeknownst to the jury, Deputy Pepper had received information  
13 from an informant that Mr. Asuncion was at the Selah residence,  
14 driving a black Cadillac, and carrying a black case with drugs inside.  
15 See ECF No. 62 at 2. Rather than seeking to introduce such hearsay  
16 statements – and in compliance with the Court's order, ECF No. 76<sup>2</sup> –  
17 the Government carefully directed Deputy Pepper to explain only what  
18 he was looking for while surveilling the Selah residence. Thus, the  
19 Cadillac and black case served as identifiers of Mr. Asuncion, akin to

---

20  
21 <sup>1</sup> Quotations and citations to the trial proceedings are taken from a  
preliminary transcript provided by the Court Reporter. Neither party  
requested an official trial transcript.

22 <sup>2</sup> In addressing Mr. Asuncion's related motion in limine before trial, the  
Court ruled as follows:

23           [T]he Government may elicit testimony that an agent "received  
24 information from a source, and that based on this information the  
agent conducted surveillance at a specific location and was  
25 looking for Defendant, in a dark Cadillac, carrying a suitcase."  
The Government is cautioned to refrain from arguing, or eliciting  
26 testimony, that Defendant is more likely to have possessed the  
briefcase – or the methamphetamine therein – because a  
confidential informant said as much."

ECF No. 76 at 4.

1 describing someone as "wearing a leather jacket" or "holding a green  
2 umbrella." See Fed. R. Evid. 801(c) (limiting prohibition against  
3 hearsay to statements "offered to prove the truth of the matter  
4 asserted"). Further, by telling the jury that he was on the lookout  
5 for those identifiers, Deputy Pepper was explaining to the jury why  
6 those particular facts stood out to him as being noteworthy.

7 Contrary to Mr. Asuncion's arguments, Deputy Pepper's testimony  
8 did not suggest there was any connection between the black case and  
9 the federal arrest warrant. The Government's arguments likewise made  
10 no connection between the warrant and the black case.<sup>3</sup> Moreover, even  
11 if the jury somehow incorrectly inferred from Deputy Pepper's  
12 testimony that the black case was linked to the federal warrant, Mr.  
13 Asuncion does not show how this caused him any prejudice - let alone  
14 why justice requires a new trial. See *Pimentel*, 654 F.2d at 545  
15 (reasoning that new trials are appropriate only in "exceptional  
16 cases").

### 17 **III. TEXT MESSAGES**

18 During trial, the Government presented the jury with evidence of  
19 text-messages found on a phone linked to Mr. Asuncion. The first  
20 group of text messages consisted of an exchange between Mr. Asuncion  
21 and someone named Kandi, as summarized below:

---

23 <sup>3</sup> In closing, the Government stated as follows:

24 Deputy Pepper . . . told you that on February 9th of this year he  
25 was assigned to look for the defendant because there was an  
26 outstanding warrant for the defendant's arrest. And based on  
some information he received, he went to a specific house in  
Selah, and he told you that he was looking at that house for the  
defendant, he was looking for a black car, and he was looking for  
a black case . . . ."

1 Incoming: This is Kandi look I'm not trying to kick it or be  
2 ur friend I'm just trying to get some dope can u  
hook me up or no I got money  
3 **Outgoing: Yes how much**  
Incoming: A ball  
Incoming: I don't have a ride tho  
4 **Outgoing: Where you at**  
Incoming: On nobhill across from the dollar store  
5 Incoming: R u coming ?  
Incoming: Hello  
6 **Outgoing: On way**  
Incoming: I already got some thanks tho unless u wanna front  
7 me til Thursday  
Incoming: Aye it's Kandi can I get something er what?  
8 **Outgoing: Like what**  
Incoming: Ball lol  
9 See Government's Exhibit 15 (errors in original) (emphasis added).

10 The Government likewise introduced a similar text-message  
11 exchange between Mr. Asuncion and someone named Brasker:

12 Incoming: Bro I need oz shit  
Incoming: There's a bracelet and ring here if your interested  
13 plus I need a oz weed  
**Outgoing: K**  
14 Incoming: Ok  
Incoming: This girl is the one with the jewelry its pretty  
15 nice  
**Outgoing: How much**  
16 Incoming: She just wants some shit she said haha  
Incoming: Bro I need to ozs of shit i got some one coming  
17 from out of town  
Incoming: What happened. Bro  
18 **Outgoing: To many cops**  
**Outgoing: U still want**  
19 Incoming: How much best deal u can do 2 ounces smoke and qtr  
oz new shit  
20 **Outgoing: 225\$**  
Incoming: Ok I got \$180 till later today  
21 Incoming: Is that cool  
**Outgoing: K**  
22 Incoming: Ru coming back bro  
Incoming: Cop has someone pulled over across the street  
23 Incoming: I need to get some shot to qtr oz then another qtr  
oz in a bit plus the smoke  
24 Incoming: I can come there in bu myself I need shit and weed  
Incoming: Ha I need oz weed and qtr oz  
25 Incoming: Shit  
**Outgoing: In selah be over soon u need weed**  
26 Incoming: Ya I have enough for one oz smoke qtr oz shit

1 Incoming: Then I'm going to need another oz weed and qtr oz  
shit later yoday

2 Incoming: I need another qtr

3 Incoming: Oz

3 **Outgoing: K**

4 See Government's Exhibit 16 (errors in original) (emphasis added).

5 According to Mr. Asuncion, the Court should not have admitted  
6 the above text messages into evidence. Mr. Asuncion argues that "his  
7 statements or responses in the texts were a mere pretext to  
8 consideration of the incoming texts from Kandi and Brasker, and for  
9 the truth of the matter asserted." ECF No. 85 at 5. At trial,  
10 however, the Government introduced sufficient evidence to show that  
11 Mr. Asuncion authored the bold outgoing text messages, meaning they  
12 constituted party admissions. As is common with responsive  
13 statements, the bolded texts lack meaning without understanding what  
14 gave rise to them in the first place; statements such as "K" or "U  
15 still want" will have wholly different meanings depending on what  
16 preceded and prompted them. Thus, the incoming texts were admitted,  
17 not to prove the truth of those particular texts' content, but rather  
18 to inform the meaning of Mr. Asuncion's responses.

19 Despite Mr. Asuncion's claims otherwise, the disputed text  
20 messages were not admitted to show "that Mr. Asuncion was approached  
21 by at least two separate people seeking to buy drugs from him." See  
22 ECF No. 85 at 4. Instead, they were used to show that Mr. Asuncion  
23 made statements agreeing to sell drugs to two separate people.  
24 Accordingly, the Court finds it did not err in admitting the text  
25 messages and their admission does not weigh in favor of granting a new  
26 trial.



1 could introduce the prior conviction to prove something other than Mr.  
2 Asuncion's criminal propensity, "such as motive, intent, knowledge, or  
3 absence of mistake."<sup>4</sup> ECF No. 62 at 19 (citing Fed. R. Evid.  
4 404(b)(2)). After all, the Government was entitled to introduce  
5 evidence – so long as it was otherwise admissible – if it tended to  
6 show knowledge or intent, even if Mr. Asuncion did not raise those  
7 issues in his defense. See *United States v. Mayans*, 17 F.3d 1174, 1182  
8 (9th Cir. 1994) (reasoning that knowledge and intent are material  
9 issues, which the government must prove, regardless of whether those  
10 issues are disputed by the defendant).

11 Mr. Asuncion's prior conviction showed that he was familiar with  
12 the methamphetamine trade and knew how it was generally stored,  
13 transported, and sold. Especially given the testimony at trial that  
14 Mr. Asuncion was seen handling the black case and even admitted that  
15 he "may have looked in the [case]," his prior conviction was evidence  
16 of knowledge. Further, the prior-conviction evidence suggested Mr.  
17 Asuncion had the requisite intent, as it suggested that he knew that  
18 the amount of methamphetamine in the black case went far beyond a  
19 personal-use amount. See Fed. R. Evid. 401.

---

22 <sup>4</sup> In its prior order, ECF No. 62, the Court ruled that the 2007 conviction  
was admissible after analyzing it under the applicable four-part test:

23 Such evidence may be admitted if: (1) the evidence tends to prove  
a material point; (2) the other act is not too remote in time;  
24 (3) the evidence is sufficient to support a finding that  
defendant committed the other act; and (4) (in certain cases) the  
act is similar to the offense charged.

25 *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (quoting *United*  
26 *States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002)). The Court also  
determined that, under Rule 403, the probative value was not substantially  
outweighed by any prejudicial impact. See ECF No. 62 at 20.

1       The Court therefore finds the evidence of Mr. Asuncion's 2007  
2 prior conviction was properly admitted. Given both the Court's  
3 limiting instruction and the manner in which the Government used the  
4 evidence, the Court further finds any prejudicial impact did not  
5 outweigh the probative value of Mr. Asuncion's 2007 conviction. See  
6 Fed. R. Evid. 403. The admission of evidence relating to Mr.  
7 Asuncion's prior conviction for distributing methamphetamine does not  
8 weigh in favor of a new trial.

9                                   **V.     CONCLUSION**

10       The Court finds that it properly admitted Deputy Pepper's  
11 testimony, the text messages from Kandi and Brasker, and limited  
12 evidence regarding Mr. Asuncion's 2007 conviction. Moreover, even  
13 assuming arguendo that one or more of these evidentiary rulings did  
14 constitute error, Mr. Asuncion suffered no substantial prejudice as a  
15 result of those rulings. See Fed. R. Crim. P. 33. The jury's verdict  
16 was supported by the weight of the evidence and the interest of  
17 justice does not require a new trial. *Id.*; see also *Pimentel*, 654 F.2d  
18 at 545.

19       Accordingly, **IT IS HEREBY ORDERED:**

20       **1.     Defendant's Motion for New Trial, ECF No. 85, is DENIED.**

21       /////

22       /////

23       ////

24       ///

25       //

26       /



1       **2.**     As Defendant has already obtained the Rule 17(c) subpoena  
2             requested therein, Defendant's Ex Parte Motion, **ECF No. 70**,  
3             is **DENIED AS MOOT**.

4       **IT IS SO ORDERED.**   The Clerk's Office is directed to enter this  
5 Order and provide copies to all counsel.

6       **DATED** this   18<sup>th</sup>   day of January 2018.

7                                       s/Edward F. Shea \_  
8                                       EDWARD F. SHEA  
9                                       Senior United States District Judge